T.R. HAMZAH & YEANG SDN. BHD.

v.

LAZAR SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 46 OF 1983]
22 SEPTEMBER 1984

CONTRACT: *Building contract - Whether learned Judge was right in ordering the appellant to issue a letter of release - Interpretation of contractual provisions defined by the Pertubuhan Arkitek Malaysia (PAM) conditions of professional engagement - Whether appellant could refuse to issue letter of release by referring the issue of fees payable to him to the Court and refusing to refer the issue of fees to the Institute of Architects for settlement.*

CIVIL PROCEDURE: *Injunction - Whether form of order contrary to O. 29 r. 1(4), Rules of the High Court 1980 - Whether mandatory injunction can be granted before trial - Grant of mandatory injunction discretionary - Specific relief under s. 50 of Specific Relief Act 1950 - Whether learned Judge's order contrary to principles on which relief can be granted on interlocutory applications.*

In 1980 the respondent employed the appellant (a firm of architects) to build an office building on the usual contractual terms as defined by the Pertubuhan Arkitek Malaysia (PAM) conditions of engagement. The overall fee agreed was 4% of the total contract cost of the whole project.

In August 1982, while approval of the plans was under consideration by the planning authority, the appellant sued the respondent for the balance of the professional fees. The respondent denied the claim and averred that the sum claimed was not a genuine pre-estimate of the professional fees.

In October 1982 the appellant terminated its own services on ground of failure of payment of fees. In November 1982 the respondent requested the appellant to refer the dispute to PAM for decision and pending settlement to issue a letter of release to enable the respondent to engage another architect to continue with the work. The appellant refused both requests.

By a Summons in Chambers the respondent applied for an order that the appellant forthwith issue the respondent with a letter of release to enable the respondent to engage another architect to proceed with the construction of the building as the validity period for the approval of the building plans was for one year only. After hearing both parties, the learned Judge made an order in terms. The appellant appealed.

Held:

[1] As provided by O. 29 r. 1(1) of the Rules of the High Court 1980 an application for an injunction may be made before or after the trial, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice. Therefore the respondent need not make a specific prayer for the letter of release in his counterclaim. The learned Judge's order was not contrary to O. 29 r. 6 of the Rules of the High Court 1980.

[2] The form of the learned Judge's order was in proper order as provided by O. 1 r. 7 of the Rules of the High Court 1980 which allows variations to be made to prescribed forms. The need for prescribed forms is to ensure uniformity and conformity but variations to such forms are permitted to mitigate excessive technicality and to meet the requirements of a particular case.

[3] The grant of a mandatory injunction is entirely discretionary. It is a discretion to be exercised sparingly but in a proper case unhesitatingly. An appellate Court will not interfere with the exercise of the discretion by a lower Court unless the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice.

[4] The respondent is entitled to ask for mandatory relief under the Specific Relief Act 1950 against the appellant to do something which he is under obligation to do by way of an interlocutory application before trial. There is no limit to the practice of the Court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the administration of justice at the hearing of the cause.

[5] There is no custom that building plans belong to the architect and not to his employer. The architect has a possessory lien over the plans and drawings remaining in his possession. The employer has an implied licence to use the plans and drawings. It would be inconsistent to the terms of engagement as defined by PAM if the architect can disallow his plans to be used unless he is paid the fees despite the fact that the issue of fees is pending before the Court. The letter of release signifies that the appellant has given his consent for another architect to continue the project and if necessary, use the plans already approved. The giving of the letter of release would not affect the outcome of the trial on the quantum of fees to be paid for the appellant's services rendered.

[6] The contractual obligation to issue a letter of release is not conditional upon the constitution of the forum but on whether the dispute is being referred for settlement. The jurisdiction of the Court is much wider than any other dispute settling forum. The Court would not allow the appellant to withhold the letter of release as the appellant was in breach of contract: the project was not abandoned, the appellant's services were not terminated by the respondent, the appellant terminated his own services and sued for his fees and took advantage of certain PAM provisions so as to hold the respondent to ransom.

[Appeal dismissed with costs.]

Cases referred to:
Gebruder Naf v. Ploton [1890] 25 QBD 13
Morgan v. Greatrex [1884] WN 2
Soon Nam Co. Ltd. v. Archynamics Architects [1979] 1 MLJ 212
American Cynamid Co. v. Ethicon Ltd. [1975] 1 All ER 504
Gibb & Co. v. Malaysia Building Society Bhd. [1982] CLJ (Rep) 99
Richards v. Richards [1983] 3 WLR 173
Wah Loong (Jelapang) Tin Mine Sendirian Berhad v. Chai Nyen Yiok [1975] 2 MLJ 109
Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd. [1979] 1 MLJ 150
Ratnam v. Cumarasamy & Anor. [1965] 1 MLJ 228
Jackson v. Normanby Brick Co. [1899] 1 Ch 438
Davies v. Gas Light and Coke Co. [1909] 1 Ch 708
Re Court Hill Canteen [1972] 2 MLJ 257
Astro Exito Navegacion SA v. Southland Enterprise Co. Ltd and Anor. [1982] 3 All ER 335
Blair v. Osborne & Tomkins [1971] 2 QB 78
Caldwell v. Sumpters [1971] Ch 1007
Stovin-Bradford v. Volpoint Ltd. [1972] Ch 478

Legislation referred to:
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 45
Specific Relief Act 1877 (India), s. 52
Rules of the High Court 1980, O. 1 r. 7, O. 29 r. 1(4),O. 29 r. 6, O. 92 r. 4
Specific Relief Act 1950, s. 50, s. 51(2), s. 53.

Other sources referred to:
Supreme Court Practice (1982), Vol. 1, at p. 9 & 511.
Mallal's Supreme Court Practice, Tan Sri Datuk Chang Min Tat 2nd Edn. at p. 7.
Halsbury's Laws of England, 4th Edn., Vol. 24, p. 534 & 595 para. 948 & 1069.
Hudson on Building Contracts, 4th Edn., Vol. II, p. 9

For the appellant - V.K. Palasuntharam; (Jason Lee with him); M/s. Nahappan, Peri & Partners
For the respondent - Loh Siew Cheang; (William J.K. Leong with him); M/s. Joseph Tan & Tang

JUDGMENT

Lee Hun Hoe CJ Borneo:

This appeal is against the decision of the learned Judge in ordering the appellant to issue a letter of release. There are fifteen grounds of appeal but mostly interrelated. Some of the grounds have no substance at all. We do not propose to embark on a journey into all the grounds but would concentrate on the main points which merit consideration. Central to all these points is the main issue, that is, whether the learned Judge was right to make the order in the circumstances.

We need only to set out the facts shortly. On 17 April 1980 the respondent employed the appellant, a firm of architects, to build a 27-storey office building at Jalan Ampang, Kuala Lumpur on the usual terms as defined by the Pertubuhan Arkitek Malaysia (PAM) conditions of engagement. The employment was for the whole project. The overall fee agreed was 4% of the total contract cost of the project. Over two years later, on 18 August 1982, while approval of the plans was under consideration by the relevant planning authority, the appellant sued the respondent for the balance of the professional fees of RM514,000. Up to that stage the appellant had already been paid RM80,000. The respondent denied the claim and averred that the sum claimed was not a genuine pre-estimate of the professional fees. It is maintained that the appellant is entitled, if at all, only to a *quantum meruit* for services rendered. By para. 6 of the defence the respondent alleged that the appellant was in breach of contract and negligently failed to exercise reasonable care, as a result the approval of the drawing was delayed. This affected the sales of the properties by the respondent. Hence the counterclaim for consequential loss of RM450,000. The appellant disputed the counterclaim.

Curiously enough, on 12 October 1982, after suing the respondent, the appellant then terminated its services as architects on ground of failure of payment of fees. On 1 November 1982 the respondent wrote to the appellant requesting for the dispute to be referred to PAM for decision and pending reference the appellant was to issue a letter of release to enable them to engage another architect to continue with the work. On 3 November 1982 the appellant replied denying the request and stating that the PAM conditions of engagement should not apply as there was no agreement to refer any dispute to arbitration. Until all the fees were paid the appellant would not issue a letter of release.

By a Summons in Chambers dated 25 November 1982 the respondent applied for an order that the appellant forthwith issue the respondent with a letter of release to enable the respondent to engage another architect to proceed with the proposed construction of the

building. On 2 December 1982 the building plans were approved by the Jabatan Arkitek Bahagian Kawalan Bangunan Dewan Bandaraya. The validity of the approval was for one year only. After hearing the parties the learned Judge made an order in terms on 5 February 1983. Hence the appeal.

The appellant complained that no prayer for the letter of release was prayed in the counterclaim and that it was contrary to O. 29 r. 6 of the Rules of the High Court 1980. He also submitted that an interlocutory application should only be made in aid of a prayer in the Statement of Claim or in the Defence or Counterclaim. The short answer is, of course, provided by O. 29 r. 1(1) which reads:

> An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

The appellant took objection to the form of the order as it was contrary to O. 29 r. 1(4) of the Rules of the High Court 1980 which provides that "An order for interim injunction must be in Form 58." He referred to the Supreme Court Practice 1982 and cited *Gebruder Naf v. Ploton* [1890] 25 QBD 13 and *Morgan v. Greatex* [1884] WN 2. We think in the circumstances his objection is without substance. Order 1 r. 7 of the Rules of the High Court 1980 is clear and states that:

> The Forms in Appendix A shall be used where applicable with such variations as the circumstances of the particular case require.

The English O. 1 r. 9(1) of the Supreme Court Practice 1982 is practically word for word the same as our O. 1 r. 7 except for our "Appendix A", the English uses "Appendices". The *Supreme Court Practice* (1982) Vol. 1, at p. 9 under the effect of the rule it is stated:-

> The need for these prescribed forms is to ensure, so far as possible, uniformity and conformity in the practice and procedure of the High Court. They must be used whenever applicable, but nevertheless a certain latitude is permitted, so that these forms are allowed to be used `with such variations as the circumstances of the particular case require'. This latitude is intended to mitigate excessive formality and technicality, when a variation to meet the requirements of a particular case would make the form more valuable and suitable as an instrument to achieve the real objective of the form ...

Mallal's Supreme Court Practice, 2nd Edn. by Tan Sri Datuk Chang Min Tat, formerly a Judge of this Court, has this to say at p. 7:

> Variations required by the circumstances of a particular case are permitted. Strict and slavish adherence to forms and rules is deplored as it can sometimes hinder the administration of justice, but the forms and the rules should not be disregarded for no reason whatsoever, since they embody the experience of the Courts over the years in the cause of speedy and efficient administration of justice ...

The difficulty in deciding the question of fees is the issuance of writ by the appellant before terminating its services. The learned Judge reverted to this point. We do not think it is fair to say that he did not consider the full provisions and effects of Clause 8.1 and Clause 8.2 of the PAM scale of charges. The respondent did not dispute liability but merely challenged the quantum. This has yet to be tried. At pp. 73 and 74 of the Appeal Record the learned Judge remarked:

> ... Lazar may well be right because the building has still to be built and the schedule for the partial payment of the full fee at the various stages before completion has yet to be agreed upon. What Lazar really is saying amounts to this: that, according to conditions (2) and (3)

> of the terms of engagement, the PAM scale for the payment of a portion of the total fee at the various earlier stages does not apply in this case because there was no agreement to apply it but that it would apply where there was an abandonment of the project or a termination of the engagement.

Where an architect contracts to perform an entire work, as for instance, to prepare, charges and superintendent the whole work, for a certain sum whether fixed on the basis of a commission on the outlay or otherwise, his charges are not recoverable until the whole work is completed, but sometimes express provision is made for payment by instalments, for which the architect can sue as they fall due. In the letter dated 7 April 1980 the appellant stated, *inter alia*:

> We write to thank you for your appointment of ourselves as your architects. The fee agreed with you is 4% of the overall construction costs. The range of services shall be as per the attached sheet.
>
> The schedule of payment of fees shall be agreed separately.
>
> In the unlikely event that we are terminated or the project abandoned, the payment of fees due shall be in accordance to the usual PAM schedule.

As there was no abandonment of the project or termination of the engagement of the service of the appellant and further the parties had not yet agreed on the scheme for partial payment of the total fee at various earlier stages, the learned Judge considered that the question of reasonable fee would have to be decided by the Court at the trial.

We cannot say the learned Judge was wrong when he went on at pp. 89 and 90 of the Appeal Record to say:

> .. I do not think that in these proceedings the architects can rely on their letter of 11 October 1982 terminating their engagement in order to attach the PAM scale of charges as the fees for the partial payment of the total fee at the various stages before completion. This is not their cause of action in the present case.
>
> ... If the architects can rely on termination without bringing a fresh action, then the reasonable fee is that as laid down by the PAM scale: see condition (3) of the terms of engagement. If, on the other hand, as here, the architects cannot rely on termination, then the reasonable fee for partial services rendered for the work so far done has to be decided by the Courts or an arbitrator in the absence of agreement between the parties.

In support on the question of fee the appellant cited the Singapore case of *Soon Nam Co. Ltd. v. Archynamics Architects* [1979] 1 MLJ 212. There the respondents, a firm of architects, terminated the contract after their plans were returned by the Planning Department without having been approved or disapproved. They claimed the sum of $152,000 being one-third of 8% of RM5.7 million, the estimated costs of the building project, or, alternatively, the sum of $152,000 on a *quantum meruit.* The learned Judge allowed the claim to the extent of $76,000. The appellate Court dismissed the appellants' appeal but allowed the respondents' cross-appeal. It was held that the respondents were entitled to recover payment from the appellants for the work done on their behalf as provided by the contract and in accordance with the Singapore Institute of Architects' Conditions of Engagement and Scales of Professional Charges. As to the respondents' breach of their contract the appellants could have counterclaimed for the said breach but had not done so. In our case we would refer to the oft quoted observations of Lord Diplock in *American Cynamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504:

> It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

Before us appellant advanced the argument that a perpetual injunction could only be granted at the trial. To do so before the trial would be contrary to principles on which interlocutory application may be granted. In support *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ (Rep) 99 and *Richards v. Richards* [1983] 3 WLR 173 were cited. References were also made to the **Supreme Court Practice** (1982) Vol. 1 p. 511, s. 45 of the Judicature Act 1925 and para. 29/1/3 of the Sixth Cumulative Supplement to show that our 0. 51 does not give the Court such wide power. It is also the contention of the appellant that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. This view is expressed in *Wah Loong (Jelapang) Tin Mine Sendirian Berhad v. Chai Nyen Yiok* [1975] 2 MLJ 109 and referred to in *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150. Where an interlocutory injunction is sought the balance of convenience will be the overriding consideration. Halsbury's **Laws of England,** 4th Edn., Vol. 24, p. 534, para. 948 states:

> A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted...

The grant of a mandatory injunction is entirely discretionary. Every case must depend essentially upon its own particular circumstances. It is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitatingly. When the Court decides to grant such an injunction then the Court must see to it that that person against whom it is granted knows exactly what he has to do. It might be of interest to refer to *Ratnam v. Cumarasamy & Anor.* [1965] 1 MLJ 228, where their Lordships of the Privy Council stated that it would not interfere with the exercise of the discretion by a lower Court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice.

The Indian Specific Relief Act, 1877 is *pari materia* with our Specific Relief Act 1950. The right to an injunction depends in India upon the statute and is governed by provisions of the 1877 Act. Our s. 50 is similar to s. 52 of the Indian Act 1877. Section 50 says that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual. It is the contention of the appellant that when our s. 51 (2), which is similar to the Indian s. 53 (2), says in respect of a perpetual injunction that "the defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act which could be contrary to the rights of the plaintiff" that subsection was using words familiar to the Chancery Division of the High Court in England in the eighteen-seventies. But it comprehends what is now expressed in direct mandatory form. *Halsbury's Laws of England,* 4th Edn., Vol. 24, p. 595, para. 1069, under the heading of Form of Mandatory Injunction reads:

> It was formerly the practice of the Court of Chancery to word mandatory injunctions in an indirect prohibitory form, but now all such injunctions should be worded in the direct mandatory form, such as directing buildings to be pulled down and removed. There is now no distinction in principle between the negative and the positive form...

The footnotes to para. 1069 refer to two cases. The first one in *Jackson v. Normanby Brick Co.* [1899] 1 Ch 438, where the headnote says "An injunction, the effect of which is to require the performance of a certain action such as the pulling down and removal of buildings, should

now be made in a direct mandatory form, and not in the indirect form hitherto in use." The other case is *Davies v. Gas Light and Coke Co.* [1909] 1 Ch 708, where Cozens-Hardy MR in affirming the decision of Warrington J approved his statement that:

> I can find no distinction in principle between granting an injunction to restrain a company from interfering with the right and granting an affirmative order compelling a company to grant the right.

On the above authorities the appellant contended that the order made by the learned Judge had a double effect, that is to say, a positive effect and a negative effect as envisaged by s. 53 of our Specific Relief Act, 1950. He pointed out that Encik Kenneth Yeang in his affidavit dated 24 January 1983 was asserting his right within s. 51 (2) of the 1950 Act. The order made practically shut out his right. We will return to this later. It is also the contention of the appellant that an interlocutory application can only be made in aid of pleading and that the order made by the learned Judge is contrary to principles on which relief can be granted on interlocutory application. In *Richards v. Richards Lord Brandon of Oakbrook stated* at p. 196:

> Before 1967 the only power which the High Court had to make an ouster order was the general power to grant injunctions conferred on it by s. 45 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 ("the Act of 1925"). That subsection provided, so far as material: 'The High Court may grant ... an injunction ... in all cases in which it appears to the Court to be just and convenient so to do.' The subsection replaced in substantially the same terms s. 25 (8) of the Supreme Court of Judicature Act 1873, in respect of which it had long been held that, despite the apparently wide words of the subsection, the High Court only had jurisdiction to grant injunctions for the purpose of protecting legal or equitable rights: *North London Railway Co. v. Great Northern Railway Co.* [1883] 11 QBD 30, 40 per Cotton LJ It follows that s. 45 (1) of the Act of 1925, and s. 37 (1) of the Supreme Court Act 1981 by which it has now been replaced in similar terms, must be interpreted as subject to the like limitation in their scope.

The respondent rightly points out that *Richards v. Richards* is concerned with a prohibitory injunction to prevent a husband from going into the wife's house. *Re Court Hill Canteen* [1972] 2 MLJ 257 cited by the appellant does not necessarily support its contention. Raja Azlan Shah J, as he then was, stated:

> I think the law is very clear. A perpetual injunction can only be granted by a decree in a suit. Since an originating motion is not a suit, the motion must fail. There is another point. One can bring an action for perpetual injunction before filing a writ of summons in the case of urgency. This is clear from the case of *L. v. L.* [1969] 1 All ER 852.

On the other hand, it is the contention of the respondent that the respondent is not asking for preventive relief but for mandatory relief. The whole of Part III Chapter 9 consisting of ss. 50 and 51 deals with preventive relief and has therefore no application. The respondent is asking for specific relief against the appellant to do something which he is under obligation to do. In *Astro Exito Navegacion SA v. Southland Enterprise Co. Ltd. and Anor.*[1982] 3 All ER 335, where the sellers, a Panamanian company, agreed to sell a vessel to the buyers, a Taiwanese company in accordance with a memorandum of agreement dated 2 July 1980. The sellers agreed to deliver the vessel to Taiwan with a valid gas-free certificate and a notice of readiness which was to be countersigned by the buyers. Under the terms of the contract, it was agreed that arbitration of any dispute arising out of the sale was to be in London in accordance with English law. The sellers duly delivered the vessel but the buyers refused to accept the notice on the ground that the gas-free certificate was not valid. So they refused to countersign the notice of readiness. The sellers sued the buyers for specific

performance of the contract. The buyers applied for stay pending the outcome of arbitration. On 24 October 1980 the learned Judge stayed the proceedings but on terms which included by way of interim relief granted to the sellers injunctions directing the buyers (1) to countersign the notice of readiness by 28 October 1980, failing which the notice was to be signed by a master of the Supreme Court for and on behalf of the buyers, and (2) to instruct the Taiwan bank to authorise the London bank to release the moneys secured by the letter of credit, the moneys so released to be lodged in the joint names of the parties' solicitors until further order. The buyers failed to comply with the order on the due date so a master of the Supreme Court signed the notice of release. The London bank when presented with the documents necessary to operate the letter of credit refused to release the money. The buyers sued the London bank for refusing to pay on the letter of credit. Subsequently, the arbitrators awarded damages to the sellers for the buyers' breach of contract. The sellers and the buyers then applied to have the appeal withdrawn but the sellers' claim against the London bank remained alive. So the bank applied to intervene in the appeal. The bank contended, *inter alia*, that the learned Judge had no jurisdiction to make the order of 24 October 1980 because he had purported to grant partial specific performance by way of an interim order. At p. 346 Ackner LJ said:

> ... There is, he contended, no instance of an interlocutory order to compel the execution of a contractual obligation, in particular to pay any sum of money. He thus argued that the orders made were not permissible. While conceding that interim mandatory orders are, of course, not infrequently made, he maintained that these were essentially restorative orders, in that they directed a party to restore the *status quo* which he had disturbed ...

He went on at p. 347 to point out that:

> The industry of junior Counsel for the sellers has unearthed *Smith v. Peters* [1875] LR 20 Eq 511. Since this is, in our judgment, a case of considerable importance and which does not appear to have been cited in the past, we feel that we should quote extensively from it. The headnote reads as follows:
>
> > Where an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein at a valuation by a person named by both parties, and he undertakes the valuation, but if refused permission by the vendor to enter the premises for that purpose, the Court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. The Court had jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing.

The following passage to be cited also answers the point raised by the appellant that it was contrary to principle to grant a mandatory order of this nature on an interlocutory application before trial. Having referred to the headnote, Ackner LJ continued:

> It was contended for Chase that it was contrary to the practice of the Court to make a mandatory order of this nature on an interlocutory application before the hearing of the case. It was argued that there was only an incomplete contract, which the Court could not compel the defendants specifically to perform.
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> Jessel MR said in his judgment (at p. 512-513):
> The first question that I have to consider is whether this application is in accordance with the practice of the Court. I have no hesitation in saying that there is no limit to the practice of the Court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause. I know of no other limit. Whether they are, or are not, to be granted must of course depend upon the special circumstances of the case ...

It may be useful, bearing in mind what Jessel MR said, to refer to O. 92 r. 4 of the Rules of the High Court 1980:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Before the learned Judge the question of lien and the effect of the order sought were raised. Encik Param Cumaraswamy pointed out that the appellant chose to come to Court instead of arbitration thus giving the Court jurisdiction to decide on the issues. He stated clearly that the application was like an application for a mandatory injunction. A perusal of the notes of proceedings shows that Encik Narayanan for the appellant in actual fact conceded that that could be done when he said:-

> The letter of release can be sought by seeking a mandatory injunction. *Halsbury's Laws* 4th Edn., Vol. 25, p. 334, para. 948.

The learned Judge in fact adopted the very submission made by Encik Narayanan in his judgment at p. 75 of the Appeal Record in these words:

> ... This is actually an application for a mandatory injunction; in a proper case, the Court has no more hesitation in granting a mandatory injunction than any other injunction. It is made on an interlocutory application. It can be done: see *Halsbury's Laws of England,* 4th Edn., Vol. 24, para. 948.

There is no custom that plans belong to the architect and not to the employers. In *Ebdy v. M'Gowan* ***Hudson on Building Contracts***, 4th Edn., Vol. II, p. 9, the plaintiff was an architect who had been employed by the defendant to prepare plans and get tenders for a vicarage. The plans were prepared but the defendant changed his mind and declined to proceed. He wrote to the plaintiff offering to pay and asking for the plans. The plaintiff declined to give up the plans but sued for payments and set up a custom amongst architects to retain their plans if the work was not proceeded with. Held, that such custom, even if proved, would be unreasonable, and that the defendant need not pay for the plans unless he got them. The Chief Justice *Baron Kelly* said at p. 11:

> ... The defendant was perfectly justified in refusing to pay until he had the plans. The execution of and the plans themselves formed the work and labour for which the architect charged the defendant, who was entitled to them if he had to pay for them.

If the employers did not get the plans he was paying for no benefit whatsoever. The point was made by the learned Judge who referred and quoted passages from *Blair v. Osborne & Tomkins* [1971] 2 QB 78 and *Caldwell v.Sumpters* [1971] Ch 1007 and *Stovin-Bradford v. Volpoint Ltd* [1972] Ch 478. We need only refer to the last case where *Salmon LJ* said at p. 1018:

> If the architect had been engaged for the whole project, there would have clearly been an implied licence to use his drawings for erecting the building. If the engagement had been terminated by either party before the building had been completed the licence would almost certainly still have operated; but the reasonable fee to be paid for the services rendered prior to the termination, if not laid down by the scale, would have had to be decided by the Courts or an arbitrator in the absence of agreement between the parties ...

The learned Judge made clear that the architect's lien depended on the plans and drawings remaining in their possession. He stressed that they had a lien on the plans that were with them but not on those which they had voluntarily parted with possession to the respondent. He considered that they had lost their possessory lien when they parted with the plans

without making any reservation. The respondent did not want the plans which were with the architect. But, the respondent wants a letter of release for the purpose of engaging another architect to continue with the work. This is necessary as no architect would come in unless there is a letter of release.

The learned Judge took the view that, on whichever basis, whether on the Statement of Claim or on the termination of the engagement there would still be implied a licence to use the plans. As *Salmon LJ* said at p. 1019 in *Stovin Bradford's case* [1972] Ch 478:

> Far from such a licence being necessary to give the contract business efficacy, it could only give it an air of injustice and absurdity.

The letter of release signifies that the appellant has given his consent or permission for another architect to continue with the project and, if necessary, to use the plans already approved. According to the terms of the agreement the engagement could be put to an end at any time by either giving the requisite notice. It would be inconsistent to such terms if an architect can say he would not allow his plans to be used unless he is paid the fees he demanded despite the fact that the amount of the fees is pending before the Court. The order directing the appellant to issue a letter of release by mandatory injunction is merely incidental. The purpose is to enable the respondent to get another architect to continue with the project. As stated earlier the respondent did not dispute liability but the amount he would have to pay. This can only be decided at the trial. The giving of the letter would not in any way affect the outcome of the trial; where the only question is how much the appellant is to be paid for the services rendered up to that stage. The extent of the architect's liabilities and duties in a given case may also depend on the terms and conditions of his engagement and the terms of the building contract. In construing contracts each word and provision should be carefully considered, not in its ordinary meaning alone, but in the meaning to be gathered from the circumstances of the whole document.

So much has been said about the PAM conditions of engagement and scale of professional charges. Three relevant provisions may be set out.

> Clauses 1.4.2, 1.7.1 and 1.8.1 provide as follows:
>
> 1.4.2 Upon the termination of the Architect's engagement, the Client shall pay to the Architect the balance of fees due together with all outstanding reimbursable charges in accordance with s. 8 of these Conditions. The Architect shall, on receipt of this payment or if there is a dispute existing between the Architect and his Client relating to the Architect's remuneration or otherwise then on such dispute being referred for settlement under Clause 1.7.1 and 1.8.1 of this Agreement issue a letter of release to the Client to enable the Client to appoint another Architect to continue with the work.
>
> 1.7.1 Any difference or disputes may by agreement between the parties be referred to the Institute for decision under the provisions of the Institute's standard form of Adjudication and to accept the award as final.
>
> 1.8.1 Where the parties are unable to resolve the difference or dispute by the procedure as provided in Clause 1.7 the difference or dispute shall be referred to the arbitration of a person to be agreed between the parties, or failing agreement within fourteen days after either party has given to the other a written request to agree to the appointment of an Arbitrator, a person to be nominated at the request of either party by the President of either the Institute or the Board of Architects Malaysia.

The appellant says the PAM provisions apply in respect of his fees but not in respect of other matters. This, of course, is an absurd stand for an architect to adopt. Under para. 2 of his affidavit dated 24 January 1983 Encik Kenneth Yeang says:

(a) Clauses 1.7.1 and 1.8.1 of the conditions of engagement are not applicable as there was no agreement between the parties to refer the dispute to the Institute which is a condition precedent;

(b) Pursuant to Clause 1.4.2 of the PAM conditions of engagement he is required to issue a letter of release only if his fees has been or the matter referred for settlement under Clauses 1.7.1 and 1.8.1. Since the matter has been referred to Court he is not obliged to issue the letter of release.

We can envisage three situations under cl. 1.4.2, namely:

(i) Where the architect's services are terminated he is not obliged to issue a letter of release unless the balance of his fees is paid;

(ii) Where there is a dispute relating to the architect's remuneration but the dispute is not being referred for settlement under Clause 1.7.1 or Clause 1.8.1 the architect is also not obliged to issue a letter of release;

(iii) Where there is a dispute and is being referred for settlement the architect is then obliged to issue a letter of release.

The contractual obligation to issue a letter of release is not conditional upon the constitution of the forum but on whether the dispute is being referred for settlement. A perusal of the Clause shows a clear intention to have disputes resolved expeditiously. Here we have a dispute as to the architect's remuneration but the architect refused to agree to have it referred for settlement. Instead, he took his client to Court and claimed that he was not required to issue the letter of release unless he was paid his fees. As the learned Judge rightly pointed out the architect's services were not terminated by the client. Neither was the project abandoned. The architect just left and claimed for his fees. Having taken his client to Court he then terminated his services in order to take advantage of certain PAM provisions. Clearly he was in breach of his contract. An architect by refusing reference to the Institute for settlement would have a very powerful means of preventing his client from ever getting a letter of release by merely going to Court. It must be remembered that the jurisdiction of the Court is much wider than any forum which the parties may elect to refer their dispute for settlement. We do not think in the circumstances the Court would allow the architect to withhold the letter of release. To do so would, in the words of Widgery FJ in *Blair v. Osborne & Tomkins* means "that the architect can hold the client to ransome."

For reasons given we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

Also found at [1985] 1 CLJ 72